***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

Orig

77-4060

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HECTOR MOTA-SANTANA,

Petitioner,

-v-

Docket No. 77-4060

IMMIGRATION AND NATURALIZATION SERVICE (by its District Director at New York, New York),

Respondent.

B
P/S

APPENDIX TO

PETITIONER'S BRIEF

ANTONIO C. MARTINEZ
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New York, N.Y. 10014
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MAY, 1977

MAY 25 1977
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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Filed, July 6, 1973

(Certified Record)

(Page Number)

(164-166)

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act.

In the Matter of

MOTA-SANTANA, Hector Julio, Respondent, File No. A30 107 593,

Address, 601 West 137th Street, New York, New York.

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native of Dominican Republic and a citizen of Dominican Republic;

3. You entered the United States at New York, New York on or about May 9, 1970;

4. You were then admitted for permanent residence on presentation of an Immigrant visa issued to you on April 17, 1970 by the American Consul, Santo Domingo, Dominican Republic;

5. You were granted exemption from the required labor certification as the unmarried minor child of a lawful permanent resident to the United States;

6. You were married to Andrea Soriano-Santana on May 4, 1970 in the Dominican Republic;

7. At the time of your admission to the United States

you were not in possession of a valid labor certification as required under the provisions of Section 212(a)(14) of the Immigration and Nationality Act and you were not exempt from that requirement.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provisions of law:

Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the timeof such entry, to wit, aliens who are seeking to enter for the purpose of performing skilled or unskilled labor and in whose cases the Secretary of Labor has not made the certification as provided by Section 212(a)(14) of the Act, as amended.

Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have procured a visa, or other documentation, by fraud, or by wilfully misrepresentating a material fact, under Sec. 212(a)(19) of the Act.

Filed, Feb. 8, 1974

(Certified Record)
(Page Number)
(159-161)

CHARGE: I & N Act - Section 241(a)(1) (8 USC 1251(a)(1) - Excludable - no valid labor certification.

APPLICATION: Termination of proceedings.

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 21 year old unmarried male alien, a native and citizen of the Dominican Republic who last arrived in the United States at New York, New York on May 9, 1970 at which time he was admitted as an immigrant. At the time of his arrival he was in possession of an immigrant visa issued to him by the American Consul at Santo Domingo, Dominican Republic. The respondent's visa describes him as being a single male alien who was born on November 3, 1952 and was destined to his mother in New York City. The respondent's visa indicated that a labor certification under Section 212(a)(14) of the Immigration and Nationality Act was not statutorily required in his case obviously because the provisions of that section exempted him from that requirement as the unmarried minor child of a lawful permanent resident of the United States.

The record establishes that the respondent was married on May 4, 1970 in the Dominican Republic to one Andrea Soriano-Santana. He denies that he had any knowledge that he would be excludable if he married prior to his entry. As a married person he was not entitled to an exemption from a labor certification and in

the absence of such certification was excludable at the time of his entry.

However, on January 21, 1974, a Justice of the Supreme Court, City, County and State of New York, annulled respondent's marriage because of his spouse's fraud. The decree, Exhibit 5, recites that she was duly served by personal service but did not appear.

In the State of New York after a voidable marriage is annulled the marriage is void ab initio as though it had never been. Matter of Moncrief, 235 N.Y. 390, 1923. Although it is true that Section 7 of the Domestic Relations Law provides that a voidable marriage is void from the time its nullity is declared by a court of competent jurisdiction, the intent of the statute was not to alter the rule that the annulment decree rendered the marriage void ab initio, but merely to require the concurrence of the court before the parties could treat themselves as free from the contract; only when that concurrence was obtained did the marriage become void, but when it was obtained the marriage was nullified and all the consequences of a void marriage then followed. See Matter of Moncrief, supra 393, 394.

Therefore, since the legal effect of the annulment in respondent's case is a declaration that the marriage never existed, it can no longer be held that respondent was a married person when he was admitted to the United States for permanent residence on May 9, 1970. See Matter of F - 9 I & N Dec. 275 at 277. Hence at entry

respondent was not required to be in possession of a labor certification and therefore no longer is deportable because of lack thereof. Deportation proceedings must now be terminated.

ORDER: IT IS ORDERED that the deportation proceedings herein be, and the same hereby are terminated.

/S/ Howard I. Cohen
HOWARD I. COHEN
Immigration Judge

Filed, March 6, 1974

(Certified Record)

(Page Number)

(158)

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated February 8, 1974, in the above entitled case.

2. Briefly, state reasons for this appeal.

The annulment for fraud in New York of the marriage in Dominican Republic did not void the marriage ab initio, but as of the date of the decree. Accordingly, the respondent at entry was not admissible without labor certificate. He is deportable.

The Board of Immigration Appeals in the uncontested annulment decree for fraud in New York may go behind the record and find that the annulment decree was effective as of its date and not ab initio. Therefore the respondent at entry was not admissible without labor certification. He is deportable.

Mr. Allen Shader
Trial Attorney
New York District

Filed, March 20, 1975

(Certified Record)
(Page Number)
(95)

CHARGE:

Order: Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1) - Excludable - no valid labor certification

APPLICATION: Reversal of immigration judge's decision

This is a Service appeal from an order of an immigration judge terminating the deportation proceedings. The record will be remanded to the immigration judge.

The immigration judge noted during the course of the deportation proceedings that the verified complaint was an integral part of the annulment decree and he wished to consider it before rendering a decision (Tr. p. 15). It is not included in the record. In the light of the respondent's testimony that in July 1972 he decided to get a divorce because the marriage was not convenient for him, we have concluded that the verified complaint is important evidence bearing on the validity of the annulment action. The verified complaint should be made part of the [illegible]. In this connection it should be noted that in Matter [illegible] I&N Dec. 102(BIA 1947), we said "... that the New York courts are guided by equitable principles in applying the doctrine of 'relation back.' They refuse to apply this fiction where its application under the facts of a particular

case would result in injustice." The Service will have an opportunity to fully explore the question of the validity of the annulment action. This will allow the immigration judge to make a new decision on the augmented record. Accordingly, the following order will be entered.

ORDER: The record is remanded to the immigration judge for further proceedings consistent with the foregoing opinion.

Chairman

Board Member Irving A. Appleman abstained from consideration of this case.

Filed, Oct. 15, 1975

(Certified Record)

(Page Number)
(81)

CHARGES:

Order: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1) - Excludable - no valid labor certification

APPLICATION: Motion to reopen and reconsider

On March 20, 1975 we remanded the record in this case to the immigration judge for further proceedings. Now the respondent moves us to reconsider that decision and to reopen the case ourselves, as no further proceedings have yet been held by the immigration judge. The motion will be denied.

Further proceedings were scheduled for June 23, 1975. We have been informed that counsel for the respondent requested a postponement and that the Immigration and Naturalization Service was prepared to reschedule the matter for September. Under these circumstances, we see no reason to alter our earlier decision.

ORDER: The motion is denied and the record returned to the immigration judge.

Chairman

Board Member Irving A. Appleman abstained from consideration of this case.

Filed, March 23, 1976

(Certified Record)
(Page Number)
(65-67)

CHARGE: I & N Act - Section 241(a)(1) 8 USC 1251(a)(1) - Excludable - no valid labor certification.

APPLICATION: Termination of proceedings.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 23 year old unmarried male alien, a native and citizen of the Dominican Republic, who last arrived in the United States at New York, N.Y. on May 9, 1970, at which time he was admitted as an immigrant. At the time of his arrival he was in possession of an immigrant visa issued to him by the American Consulate at Santo Domingo, Dominican Republic. The respondent's visa describes him as being a single male alien who was born on November 3, 1952 and was destined to his mother in New York City. The respondent's visa indicated that a labor certification under Section 212(a)(14) of the Immigration and Nationality Act was not statutorily required in his case being the unmarried minor child of a lawful permanent resident of the United States.

The record establishes that the respondent was married on May 4, 1970 in the Dominican Republic to one Andrea Soriano Santana. He denied that he had any knowledge that he would be excludable if he married prior to entry, although there is a form FS 548, which he signed on April 17, 1970 before the American

Consul acknowledging that if he married prior to his application for admission into the United States he would be subject to exclusion. As a married person he was not entitled to an exemption from the labor certification and in the absence of such a certification he was excludable at the time of entry. However, on January 21, 1974 a Justice of the New York Supreme Court annulled respondent's marriage because of his spouse's fraud. The decree recites that she was duly served by personal service but did not appear.

A decision was rendered by me on February 8, 1974, wherein I terminated the proceedings on the theory that the annulment had the effect of terminating the marriage ab initio. He was held to be therefore exempt from the labor certification requirement being unmarried at time of entry. The Board of Immigration Appeals in a decision of March 20, 1975 reversed and remanded it for the purpose of obtaining the verified complaint which should be made part of the record. The verified complaint is now part of these proceedings as Exhibit R-1. Subsequently, the Board of Immigration Appeals in an unrelated case, In re: Manuel Antonio Rodriguez, decided February 19, 1976, recites that the respondent signed form FS 548 as in the instant case, which informed him that there would be a loss of preference status if marriage took place prior to admission to the United States and would be subject to exclusion.

It is clear that in both cases the respondents entered into a marriage prior to their admission to the United States despite the fact that they had been previously warned that they will lose their preference status. (FS 548). The Board In re. odriguez, supra further stated that there is no compelling reason why the respondent should stay in the United States when he abuse the procedures made available to him under the Immigration Laws by securing entry into the United States with an exemption from the labor certification passing himself off as the child of a lawful permanent resident when in fact he had gotten married in the period between the issuance of the visa and the entry into the United States merely because of an annulment of his marriage subsequent to the trip. The facts in the aforementioned case are similar to the case at bar and is therefore controlling. Even if full faith and credit was given to the annulment decree to void the marriage ab initio, the respondent was still inadmissible to the United States at the time of entry. Under the facts which existed at the time of entry, regardless of what effect the courts might give to the decree of annulment, the respondent was inadmissible at that time (underlining supplied). Therefore, the respondent's motion to terminate these proceedings is denied. However, the respondent will be granted the relief of voluntary departure as a matter of discretion.

ORDER: IT IS ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure without

expense to the Government on such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as requited the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to the Dominican Republic.

/S/ Howard I. Cohen

HOWARD I. COHEN
Immigration Judge

Filed Aug. 31, 1973

(Certified Record)
(Page Number)
(57-59)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - -X

HECTOR JULIA MOTA,

Plaintiff,

-against-

ANDREA MOTA,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - - -X

ANNULMENT COMPLAINT

Plaintiff, for his complaint herein, by his attorney, alleges:

FIRST: The plaintiff and defendant were married in Santo Domingo, Dominican Republic, on the 4th day of May, 1970.

SECOND: The plaintiff was and still is a resident of the State of New York at the time of commencement of the above entitled action.

THIRD: The plaintiff has been a resident of the State of New York for a continuous period of two years immediately preceding the commencement of the above entitled action.

FOURTH: That at divers times prior to the marriage of the parties hereto, and for the purpose of inducing the plaintiff to marry her, the defendant falsely and fraudulently represented to plaintiff that she loved him and intended to live with him

as husband and wife.

FIFTH: That these representations were made solely for the purpose of inducing the plaintiff to enter into a marriage with the defendant so that the latter could obtain admission into the United States and so evade the United States Immigration Law exemptions.

SIXTH: That subsequent to the marriage the plaintiff immigrated by himself to the United States to establish a home for the parties hereto but subsequently discovered in June, 1972 that the defendant refused and has ever since refused to live as husband and wife with the plaintiff; that she maintained that she felt no love and affection for the plaintiff and never has felt such love and affection; that she has maintained that she never intended to live as husband and wife with the plaintiff.

SEVENTH: That there are no issue of this marriage.

EIGHTH: That this action for annulment was commenced on the 10th day of July, 1973.

NINTH: That the plaintiff discovered the fraud of the defendant herein alleged on the 11th day of June, 1972.

TENTH: That this action for annulment is commenced, pursuant to CPLR 203(f) and 214(7), within 3 years after the discovery by the plaintiff of the facts herein alleged as constituting the fraud.

WHEREFORE, plaintiff demands judgment against the defendant that the aforesaid marriage be annulled and declared

void and for such other and further relief as may be proper and equitable.

ANTONIO C. MARTINEZ
Attorney for Plaintiff
Office & P.O. Address
324 West 14th Street
New York, N.Y. 10014
989-0404

Filed, January 24, 1974

(Certified Record)
(Page Number)
(53-54)

- - - - - - - - - - - - - - - - - - - - - - - -X

HECTOR JULIO MOTA, :

Plaintiff, :

-against- :

ANDREA MOTA, :

Defendant. :

- - - - - - - - - - - - - - - - - - - - - - - -X

JUDGMENT OF ANNULMENT

The above entitled action having been brought by the plaintiff for judgment of annulment in favor of the plaintiff and against the defendant, annulling the marriage contract heretofore existing between the parties hereto on the ground of the fraud of the defendant and the summons bearing the notation "Action to Annul a Marriage" having been duly personally served upon the defendant without the State of New York, and the defendant not having appeared within the statutory period prescribed therefor, and her time to do so has fully expired, and plaintiff having applied to this Court at a Special Term thereof, held in the County of New York, for judgment for the relief demanded in the complaint and having appeared on such application by ANTONIO C. MARTINEZ, ESQ., his attorney, and having presented his verified complaint and written proof of the ser-

vice of the summons upon the defendant, and the defendant not having appeared upon such application, and testimony having been given had in open court on the 29th day of October, 1973, before me, satisfactorily proving the allegations of the verified complaint, and the undersigned having heard and considered the proof offered and having made a decision in writing stating separately the facts found and the conclusions and upon waiver of written proof that the defendant not in the military service of the United States of America.

NOW, on motion of ANTONIO C. MARTINEZ, ESQ., attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED, that the plaintiff be and hereby is granted judgment annulling the marriage contract heretofore existing between HECTOR JULIO MOTA, plaintiff, and ANDREA MOTA, defendant, because of the fraud of the defendant.

ENTERED

/S/ Seymour Bieber
S.R. (Special Referee)

Filed, January 24, 1974

(Certified Record)
(Page Number)
(55-56)

- - - - - - - - - - - - - - - - - - - - -X

HECTOR JULIO MOTA, :

Plaintiff, : FINDINGS OF FACT AND CONCLUSIONS OF LAW

-against- :

ANDREA MOTA, :

Defendant. :

- - - - - - - - - - - - - - - - - - - - -X

The above-entitled action for judgment of annulment was brought before me on the 29th day of October, 1973. Upon the proof offered, I now state as my decision the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The residence requirements of Section 230 of the Domestic Relations Law have been met.

2. Proper service of the summons has been made on the defendant.

3. The defendant has not appeared and is in default.

4. The plaintiff and defendant were married on May 4, 1970 in Santo Domingo, Dominican Republic.

5. There are no issue of the marriage.

6. That prior to, and at the time of the said marriage, and for the purpose of inducing the plaintiff to marry her, the

defendant falsely and fraudulently represented to the plaintiff that she loved the plaintiff, and intended to live with the plaintiff as husband and wife.

7. That the plaintiff relied upon such representations, believed them to be true, and relying on such representations, the plaintiff consented to marry the defendant. Had the plaintiff known that such representations were false, he would not have married the defendant.

8. The said representations were false in that the defendant did not love the plaintiff and did not intend to live with him as husband and wife, but intended to marry the plaintiff for the sole purpose of obtaining residency in the United States.

9. That the plaintiff has not cohabited with defendant since his discovery of the truth herein.

10. That three years have not elapsed since the discovery of the facts constituting the fraud.

CONCLUSIONS OF LAW

FIRST: That the plaintiff, HECTOR JULIO MOTA, is entitled to judgment against the defendant, ANDREA MOTA, annulling the marriage relation heretofore existing between the parties hereto, by reason of the fraud of the defendant, as prayed for in the complaint.

I direct that judgment be entered accordingly.

/S/ Seymour Bieber
SPECIAL REFEREE

Filed, March 26, 1976

(Certified Record)
(Page Number)
(64)

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated March 23, 1976, in the above entitled case.

2. Briefly state reasons for this appeal.

a. The Immigration Judge refused to apply 28 U.S.C.A. 1738, (Full Faith and Credit) to the New York Judgment of Divorce.

b. There is no Federal common law under Erie v. Tompkins with respect to the effect of a New York annulment decree to the status of respondent, absent a Federal Statute to the contrary.

c. Due process and Equal Protection of the Laws under the United States Constitution is denied where 1) 28 U.S.C.A. 1738 is not applied and 2) New York law with respect to annulment is not applied to an alien.

d. Disregard of the annulment is, in effect, an extra-judicial collateral attack and is precluded, unless in a court of law and otherwise not precluded New York Res Judicata.

e. The Immigration Service has not standing to attack judgments, pursuant to a demonstrable Federal statute, otherwise final, because of Res Judicata.

/S/ S. Bernard Schwarz for
Antonio C. Martinez

Filed, January 31, 1977

(Certified Record)
(Page Number)
(2-3)

CHARGE:

Order: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1) - Excludable - no valid labor certification

APPLICATION: Termination of proceedings.

In a decision dated March 23, 1976, the immigration judge found the respondent deportable as an alien who was excludable at the time of entry under section 241(a)(1) of the Immigration and Nationality Act and granted him voluntary departure in lieu of deportation. The respondent has appealed. The appeal will be dismissed.

The respondent is a 23 year old native and citizen of the Dominican Republic, who was admitted to the United States for permanent residence on May 9, 1970. Pursuant to section 203(a)(2) of the Act, respondent was granted an exemption from the requirement of a labor certification and he obtained an immigrant visa as the unmarried son of a lawful permanent resident. However, he had married in the Dominican Republic five days before entering the United States.

The Service charges that because the respondent was married when he entered the United States, he was not an unmarried son at the time of his entry and he was therefore deportable under section 212(a)(14). The respondent contends that he is not

deportable because his marriage was judicially annulled by a New York Court on January 21, 1974; and that the annulment rendered his marriage void ab initio, as of the date of the marriage, May 4, 1970.

In a decision dated February 8, 1974, the immigration judge concluded that the New York annulment rendered the marriage void ab initio and he therefore terminated the proceedings. The Service appealed and in a decision dated March 20, 1975, we remanded the record for the inclusion of the verified complaint upon which the annulment was based. Subsequently, in an unrelated case we held that retroactive effect will not be given to a decree of annulment if to do so would act to cure a clear violation of the immigration laws. In re: Rodriguez, A 30 107 981 (BIA February 19, 1976). See also Matter of Wong, Interim Decision _____ (BIA January 12, 1977). Consequently, in his decision of March 23, 1976, the immigration judge determined that these Board decisions were controlling, and denied the respondent's motion to terminate the proceedings. He granted the respondent the privilege of voluntary departure within such time and under such conditions as the District Director shall direct, and, in the event of the respondent's failure so to depart, provided for the respondent's deportation from the United States to the Dominican Republic.

The record contains a State Department form (FS-548) signed by the respondent in which he stated that he understood that he

was going to lose his preference status if he married prior to his application for admission to the United States, and that he would then be subject to exclusion. Inasmuch as the respondent married before he left the Dominican Republic, he was not entitled to preference status as the unmarried son of a lawful permanent resident, at the time he applied for admission to the United States. Not having a labor certification, he was excludable.

More than three years after his admission to the United States, the respondent, represented by present counsel, commenced an action for annulment of his marriage. His wife did not appear in that action. A judgment of annulment of marriage was entered on January 21, 1974. The annulment of the respondent's marriage does not retroactively cure his clear violation of our immigration laws. Matter of Wong, supra. His deportability has been established by clear, convincing and unequivocal evidence.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within such time and under such conditions as may be set by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

Board Member Irving A. Appleman abstained from consideration of this case.

Filed, February 28, 1977

(Certified Record)
(Page Number)

PETITION FOR REVIEW

Petitioner Hector Mota-Santana, by his attorney, respectfully petitions the Court to review the Order of the Board of Immigration Appeals, dated January 31, 1977, Exhibit 'A'. Petitioner has been required by the respondent to depart from the United States by March 7, 1977, Exhibit 'B'.

New York, N.Y.
February 28, 1977

Respectfully submitted,

ANTONIO C. MARTINEZ
Attorney for the Petitioner
324 West 14th Street
New York, N.Y. 10014

COPY RECEIVED

Robert B. Fiske, Jr.
UNITED STATES ATTORNEY

5/25/77

Marion L. Bryant